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# State v. Richmond Appellant's Brief Dckt. 44690

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 44690
	)	
v.	)	ADA COUNTY NO. CR-FE-2012-4376
	)	
ROBERT ARTHUR RICHMOND,	)	
	)	
Defendant-Appellant.	)	APPELLANT'S BRIEF
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Robert Richmond appeals from the district court's denial of his Idaho Criminal Rule 35(a) (*hereinafter*, "Rule 35") motion. Specifically, he challenges the denial of his motion to correct an illegal sentence. Mr. Richmond's sentence was enhanced by a persistent violator. However, the felony convictions upon which the enhancement were based have since been changed to misdemeanors. Mindful of the holding in *State v. Clements*, 148 Idaho 82 (2009) (holding that Rule 35 only applies to cases in which the sentence imposes a penalty not authorized by law or where new evidence shows the original sentence was excessive), he asserts that the district court erred by denying his motion.

## Statement of Facts and Course of Proceedings

Mr. Richmond was charged with one count of felony aggravated assault. (R., pp.24-25.) The State amended the Information to allege that Mr. Richmond was a persistent violator due to Mr. Richmond having had two previous felony convictions in the State of California. (R., pp.50-51.)

Mr. Richmond was found guilty by a jury of aggravated assault and pled guilty to the persistent violator sentencing enhancement. (R., pp.71-72, 108.) Four years after his conviction, Mr. Richmond filed a motion to correct an illegal sentence pursuant to Rule 35(a). (Limited Clerk's Record on Appeal augmenting the Clerk's Record and Reporter's Transcripts filed in prior appeal No. 41093, *State v. Richmond* ("Supp. R."), pp.13-16.) Mr. Richmond asserted that his felony convictions in California had since been resentenced to misdemeanors pursuant to "Prop 47" legislation in California.<sup>1</sup> (Supp. R., pp.13-14, 41-45.) Mr. Richmond attached copies of his new misdemeanor convictions. (Supp. R., pp.32-35.) Because the felony convictions were resentenced to misdemeanors, Mr. Richmond asserted that "there now exists no foundation under which the persistent violator can be implemented." (Supp. R., p.14.)

The district court denied his motion, holding that such relief could not be granted pursuant to *State v. Clements*, 148 Idaho 82 (2009) (holding that Rule 35 only applies to cases in which the sentence imposes a penalty not authorized by law or where new evidence shows the original sentence was excessive), *Clark v. State*, 92 Idaho 827 (1969) (holding that, absent a

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<sup>1</sup> Proposition 47, also known as the Safe Neighborhoods and Schools Act, which became effective November 5, 2014, created a new resentencing provision, California Penal Code section 1170.18, which permitted certain individuals to petition the superior court for a recall of their sentence and request resentencing. See Cal. Penal Code § 1170.18; see also *Bilbua v. Los Angeles Superior Court*, No. CV 15-3095 AG JC, 2015 WL 1926014, at \*2 (C.D. Cal. Apr. 27, 2015).

showing that the defendant's constitutional rights have been implicated, a judgment and sentence based on the persistent violator statute is not subject to collateral attack following a guilty plea), and *State v. Reed*, 149 Idaho 901 (Ct. App. 2010) (holding that original guilty plea, despite fact that judgment was withheld, could be used to enhance the sentence of a subsequent DUI). (Supp. R., pp.59-63.) The district court held that "[t]he factual basis for this assertions, that the Defendant no longer has prior felony convictions, is external to the record in this case." (Supp. R., p.60.) Mr. Richmond filed a timely notice of appeal. (Supp. R., pp.66-68, 71-74.)

### ISSUE

Did the district court err in denying Mr. Richmond's motion to correct an illegal sentence?

### ARGUMENT

#### The District Court Erred In Denying Mr. Richmond's Motion To Correct An Illegal Sentence

Idaho Criminal Rule 35(a) provides that "[t]he court may correct a sentence that is illegal from the face of the record." I.C.R. 35(a). A motion to correct an illegal sentence may be brought at any time. *See* I.C.R. 35(a).

As he did in the district court, on appeal Mr. Richmond asserts that the district court erred by denying his motion to correct an illegal sentence because the felony convictions upon which the persistent violator sentencing enhancement was based were later resentenced to misdemeanors. (Supp. R., pp.13-14, 41-45.)

Mr. Richmond entered a guilty plea to the persistent violator sentencing enhancement. (Supp. R., pp.7-9.) Idaho Code section 19-2514 provides:

Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, and on such

third conviction shall be sentenced to a term in the custody of the state board of correction which term shall be for not less than five (5) years and said term may extend to life..

I.C. § 19-2514. Mr. Richmond was convicted, and his maximum possible sentence was increased pursuant to this subsection. (R., pp.137-139.)

A motion claiming a sentence is illegal pursuant to Rule 35(a) may be raised at any time. *See, e.g., State v. Clements*, 148 Idaho 82, 86 (2009). However, to merit relief on such a motion, the illegality must appear on the face of the record. *Id.* The Idaho Supreme Court has held “the term ‘illegal sentence’ under Rule 35 is narrowly interpreted as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing.” *Clements*, 148 Idaho at 86. “Rule 35 is not a vehicle designed to reexamine the facts underlying the case to determine whether a sentence is illegal; rather, the rule only applies to a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law or where new evidence tends to show that the original sentence was excessive.” *Id.* In denying Mr. Richmond’s motion, the district court found that the factual basis for his assertion that the sentence was illegal—the fact that Mr. Richmond no longer had prior felony convictions—was external to the record in this case because, as of the date of sentencing, Mr. Richmond did have prior felonies which he admitted to having at trial. (Supp. R., p.60.)

Mindful of *Clements*, Mr. Richmond asserts that the district court erred by denying his motion to correct an illegal sentence because the felony convictions upon which the persistent violator sentencing enhancement was based were later reduced to misdemeanors.

CONCLUSION

Mr. Richmond respectfully requests that the district court's order denying his motion to correct an illegal sentence be reversed.

DATED this 5<sup>th</sup> day of July, 2017.

\_\_\_\_\_/s/  
SALLY J. COOLEY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5<sup>th</sup> day of July, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

ROBERT ARTHUR RICHMOND  
RISING SUN  
8050 W USTICK RD  
BOISE ID 83704

RICHARD D GREENWOOD  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

JOHN C DEFRANCO  
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CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

SJC/eas